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Supreme Court, U.S.
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In the Supreme Court

ALEXANDER L. STEVAS
CLERK

OF THE

United States

OCTOBER TERM, 1982

LUISA LEHNER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
SAMUEL RILEY PIERCE, Secretary of the
Department of Housing and Urban Development,
HOUSE OF AFFIRMATION, Inc., a corporation,

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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QUESTIONS PRESENTED

1. Does the Fifth Amendment to the United States Constitution protect a mortgagor from loss of property by the Federal Government's use of a state nonjudicial foreclosure procedure?

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NO. _____

LUISA LEHNER, Petitioner,

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UNITED STATES OF AMERICA,
SAMUEL RILEY, Secretary
of the Department of Housing
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PETITION FOR A WRIT OF CERTIORARI TO THE
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The petitioner Luisa Lehner respectfully prays that a writ of certiorari issue to review that judgment and opinion of the Ninth Circuit entered in this proceeding on October 20, 1982.

OPINION BELOW

The opinion of the Court of Appeals,

not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Northern District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 3, 1982. A timely petition for rehearing en banc was denied on October 20, 1982, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Does the Fifth Amendment to the United States Constitution protect a mortgagor from loss of property by the Federal Government's use of a state nonjudicial foreclosure procedure?

CONSTITUTIONAL PROVISIONS INVOLVED

"No person shall . . . be deprived of . . . property, without due process of

law." United States Constitution,
Amendment Five.

STATUTORY PROVISIONS INVOLVED

California Civil Code §2924, et seq.

(Pursuant to Rule 23(1)(d), said statutory provisions are included in the Appendix.)

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked under the provisions of the Fifth Amendment of the United States Constitution; 28 U.S.C. 1331, federal question jurisdiction, 28 U.S.C. 1346(a)(2), 1346(b), 1346(f), United States as a defendant; 28 U.S.C. 2201, 2202, Declaratory and Further Relief; 28 U.S.C. 2671, et seq., Federal Tort Claims Act; 28 U.S.C. 2409a, Quiet Title; and Rule 65 of the Federal Rules of Civil Procedure, Injunctions.

This case involves a nursing home construction project which was federally insured. On September 21, 1976, plaintiff-

appellant, Luisa Lehner, filed a complaint for a temporary restraining order to enjoin the government from selling the nursing home known as Coastsides Convalescent Hospital, Montara, California, to the House of Affirmation, restitution of the property to her and damages. The Coastsides Convalescent Hospital at that time was a limited partnership with Mrs. Lehner as general partner. The court did not grant the injunctive relief. On June 15, 1978, appellant filed a First Amended Complaint which was dismissed by the Court, the Honorable R. H. Schnacke, judge, with leave to amend. On August 1, 1978, appellant filed a Second Amended Complaint, seeking Restitution, Declaratory and Injunctive Relief and damages against Carla Hills, Secretary of the Department of Housing and Urban Development, various officials of H.U.D., Fred Soviero, the inspector on the project, and the House

of Affirmation.

The federal defendants moved to substitute Patricia Harris for Carla Hills, dismissal of the federal defendants, dismissal of the Secretary, and dismissal of the case. The House of Affirmation made motions to dismiss, to strike and for a more definite statement. On April 16, 1979, the court: ordered the substitution; dismissed the other federal defendants; dismissed the breach of contract claims on the grounds that that matter should be heard by the Court of Claims, ordered the United States be made a defendant and ordered appellant to file amendment to the Second Amended Complaint. On May 16, 1979, appellant filed the amendment to the Second Amended Complaint.

In the complaint, the First Amended Complaint, the Second Amended Complaint and the Amendment to the Second Amended Complaint, petitioner raised the question

of nonjudicial foreclosure by the federal government. For example, the third cause of action of the original complaint states in pertinent part:

That siad (sic) nonjudicial foreclosure and the pending sale are in violation of Plaintiff's constitutional right to due process of law under the 5th amendment to the constitution of the United States in that Plaintiff's property was taken without adequate notice of her rights, without adequate opportunity to be represented by competant (sic) counsel and without a hearing.

The eighth cause of action of the Amendment to the Second Amended Complaint is entitled "Violation Of 5th Amendment" and states in pertinent part:

47. At no time before her property was taken did plaintiff receive proper notice of the Default & Foreclosure, nor was plaintiff given an opportunity to demonstrate HUD's responsibility for the default and foreclosure before an impartial judicial authority.

48. Said nonjudicial foreclosure and the sale were in violation of plaintiff's consti-

tutional right to due process of law under the 5th Amendment to the Constitution of the United States in that plaintiff's property was taken without adequate notice of her rights, without adequate opportunity to be represented by competent counsel, and without a hearing.

Motions to dismiss were filed by all defendants and the House of Affirmation filed a motion to strike. On November 23, 1979, the court dismissed most causes of action, dismissed the United States, substituted Moon Landrieu for Patricia Harris, and ordered defendants to answer.

The remaining defendants filed motions for summary judgment. On April 25, 1980, the court granted the motions for summary judgment, ordered the case dismissed and assessed costs against appellant.

The Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court stating in pertinent part:

Because Lehner does not dispute that the procedure prescribed by California law provides mini-

mal due process, we need not evaluate its constitutionality.

Her sole challenge is to the Government's alleged failure to notify her formally of the foreclosure sale. (Footnotes omitted)

Ct of Appeals Opinion, page 5, line 32 to page 6, line 5.

Petitioner sought rehearing in the Court of Appeals based upon: (a) the fact that throughout the pendency of the litigation, all parties understood that petitioner was mounting a direct challenge to the use of the state nonjudicial foreclosure process by the United States; (b) Section 9 of Appellant's Brief in the Court of Appeals is entitled "Does The Fifth Amendment Protect A Mortgagor From Nonjudicial Foreclosure By The Federal Government?"; and (c) oral argument before the Court of Appeals specifically concentrated on the issue of nonjudicial foreclosure by the Federal Government.

The Petition For Rehearing was denied on October 20, 1982.

On or about February 2, 1971, Coastside entered into agreements with FHA and Bankers Mortgage Company of California (hereinafter referred to as Bankers Mortgage). Under said agreements, certain improvements and additions to the nursing home facility known as Coastsides Convalescent Hospital, which was located on certain real property in Montara, California, were to be financed by a construction loan extended by Bankers Mortgage. Repayment of said loan was guaranteed by FHA under provisions of the National Housing Act, as Project Number 121-43067-PM. Pursuant to said agreement, Coastside executed a deed of trust conveying the real property in trust as security for repayment of said construction loan. Under said agreement, and under statutes and regulations applicable thereto, FHA was

responsible for regular inspection of the construction work as it was performed, to insure that all work by the construction contractor was performed in a proper and timely manner.

Fred Soviero was, at the time of the action complained of herein, an employee of FHA, whose duties included inspection and supervision of the quality and progress of the construction work financed by the loan above-described.

On or about January 18, 1972, Soviero induced petitioner to execute, on behalf of Coastsides, a Notice of Completion declaring that the construction work, for which the herein described loan had been obtained, had been satisfactorily completed. In fact, said work had not been satisfactorily completed and there remained substantial construction defects, which fact was known to Soviero. Soviero induced petitioner to execute said Notice

of Completion by representing that the construction contractor, Roberts-Pacific, Inc., did not have sufficient funds to complete the job; that if the contractor did not procure funds, it would abandon the job; that petitioner's execution of a Notice of Completion would result in the release to the contractor of substantial funds being held in escrow pending the completion of the project; that if such funds were released, the contractor would complete the project, including correction of all construction defects; and that if petitioner signed the Notice of Completion, FHA would closely supervise the contractor and his work, and effectively require him to complete the project and to cure all construction defects.

In spite of the representations and promises of Soviero, described above, the FHA did not effectively require the construction contractor to complete the

project and to cure all defects and shortly after the execution of the Notice of Completion, the contractor falsely claiming that the project had been completed abandoned the job.

Because of the construction defects which remained after the contractor had abandoned the job, Coastsides was unable to secure appropriate licenses and permits from state and local agencies to enable it, either directly or through a lessee, to reopen Coastsides. In consequence thereof, Coastsides did not receive the income which would otherwise have enabled it to make payments on the construction loan as they fell due, and said payments were not made.

As a result of Coastsides's inability to make loan payments as they fell due, FHA was required, in its capacity of guarantor, to pay the loan balance to Bankers Mortgage; upon said payment, Bankers Mortgage conveyed its right, title and

interest in the real property, including its interest as beneficiary under the deed of trust, to FHA. In purported exercise of the power of sale in the deed of trust, the real property was thereafter deeded to the Secretary Of Housing And Urban Development, who thereafter deeded it to respondent House Of Affirmation, Inc. House Of Affirmation, Inc., is presently in possession of and claims title to the real property. It had constructive notice of petitioner's claims herein, in that petitioner timely recorded with the Recorder of the County of San Mateo a lis pendens giving notice of this lawsuit.

For a period of more than three years, ending only with the original filing of this action and the sale of the real property to House of Affirmation, Inc., petitioner made repeated attempts, alone and with others, to reach an informal settlement with FHA and with the Department

of Housing and Urban Development, which would have resulted in the return to petitioner of title and possession of the real property, and reinstatement, on reasonable terms, of the construction loan. Numerous agreements were reached and promises made by officials of FHA and HUD, as described below, which would have resulted in such settlement, but such promises either were not kept or were not implemented by officials subordinate to those who made the promises.

In December of 1973, petitioner and Ms. Jerplen Keys contacted the HUD Loan Management Division in Washington, D.C., and spoke with an official there. Petitioner is not certain of the official's name, but believes it to have been Anthony Julio. They discussed a proposal under which the property would be restored to petitioner who would in turn lease it to Ms. Keys. Ms. Keys indicated that the

construction defects would have to be cured so that the necessary licenses and permits could be obtained for her to enter into such a lease. The official stated that they should not worry about foreclosure and promised that he would contract FHA management in San Francisco and see that they insisted on the contractor curing the construction defects. They then spoke with Mr. Benson of the FHA Regional Office in San Francisco, who acknowledged receipt of such a call from Washington, and who promised that FHA would enforce completion of the construction contract, whether by the same contractor or by a different contractor. In reliance on these promises, Ms. Keys deposited Twenty Thousand Dollars (\$20,000.00) with FHA as a deposit and as an initial payment for reinstatement of the loan. In spite of these promises, FHA never acted to secure completion of the project and after several months, the

deposit was returned to Ms. Keys.

In August of 1974, petitioner accompanied by her attorney, met with Mr. Benson and with Mr. Ohler of the FHA Regional Counsel's Office. They discussed petitioner's claims in the matter and further discussed her feeling that if the construction defects were corrected, she would be able to obtain permits that would put Coastsides on a paying basis and reasonably permit reinstatement of the loan. Petitioner proposed that a contractor she had secured go onto the property and make the necessary repairs. She was told that FHA could not permit this because it would result in title to the real property being clouded by mechanic's liens. Petitioner indicated that the contractor was willing to waive any lien claims, and Mr. Benson replied that in that case the contractor would be permitted to enter the property and do the necessary work. They

also discussed the fact that the loss was caused by petitioner's reliance on the unkept promises of Soviero and the inducement to sign the Notice of Completion. Mr. Benson stated that if Soviero had in fact made such promises, FHA would negotiate a reasonable settlement under which the losses caused by the construction defects would be shared between the petitioner and FHA. After this conversation, petitioner's attorney drafted a lien waiver which was approved as to form by Mr. Ohler, executed by the contractor and delivered to the FHA office. In spite of this, FHA refused to allow the contractor to enter the property and perform the necessary work.

None of these agreements were honored. In addition, petitioner assigned various Medi-Cal claims to HUD in an effort to meet her obligations. HUD never processed these claims.

Petitioner met with Mr. Benson of HUD

on or about August 29, 1974, to stop foreclosure.

On or about September 4, 1974, Mr. R. G. Litolff of the Loan Management Branch of HUD demanded a check for \$50,000 to cover the delinquency, and a letter from the State.

On September 25, 1974, petitioner's attorney requested delay of foreclosure proceedings. Despite this request, and despite the responsibility of the United States of America for the delinquency and incomplete construction, defendant United States of America, through Erwin Farley, Director of Housing Management, sent petitioner a letter on or about October 9, 1974, denying the request to forebear foreclosure proceedings.

On or about July 25, 1975, petitioner sent Mr. Alan Smith, HUD's Regional Inspector General, a letter requesting

reinstatement as owner and operator of Coastsides.

On September 16, 1976, Mr. Gary, petitioner's attorney, sent a letter to Mr. Harman of the Regional Administration for Housing Management, requesting that the sale be continued for sixty (60) days or in the alternative, that the offer to sell be set aside. Mr. Gary particularly objected to the conduct of Soviero and HUD, vis-a-vis, petitioner herein.

On September 21, 1976, petitioner filed the action herein to enjoin the sale.

On November 17, 1976, petitioner's attorney sought to stop the sale by letter to Mr. Joseph Hamblin, Area Counsel for HUD.

There were other efforts by petitioner as well. Petitioner's records are incomplete. However, defendants should have complete records of the many letters, phone calls, meetings and negotiations

with petitioner. All efforts eventually proved to be unsuccessful though petitioner did reach agreements with Mr. Benson and Mr. Ohler, which are described above.

These agreements were subsequently violated.

The Notices of Default and Foreclosure were not received by petitioner because they were mailed to the wrong address.

At no time before her property was taken did petitioner receive proper notice of the Default and Foreclosure, nor was petitioner given an opportunity to demonstrate HUD's responsibility for the default and foreclosure before an impartial judicial authority.

Petitioner's property was taken by the government through nonjudicial foreclosure. Although the Department Of Housing evaluated the property at \$372,300 when the original mortgage was approved, the government gave the property to the House of Affirmation for \$165,000.

REASONS FOR GRANTING THE WRIT

I. DOES THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION PROTECT A MORTGAGOR FROM LOSS OF PROPERTY BY THE FEDERAL GOVERNMENT'S USE OF A STATE NONJUDICIAL FORECLOSURE PROCEDURE?

Petitioner believes that this case squarely presents the issue of whether the Federal Government is entitled to use a state nonjudicial foreclosure scheme to protect its interest in a federally insured loan program. Clearly, resolution of this issue effects not only petitioner, but others who face loss of their property by foreclosure from the Federal Government.

While the Court of Appeals in the instant case did not address the issue herein presented, a number of courts have discussed the issue with differing and conflicting results. Brown v. Lynn, 394 F. Supp. 986 (N. D. Ill. 1974); Hoffman v. United States Department of Housing and Urban Development, 519 F.2d 1160 (5th Cir.

1975); United States v. White, 543 F.2d 1139 (5th Cir. 1976); and Ricker v. United States, 417 F. Supp. 133 (D. C. Me. 1976). Each of the decisions in the above-cited cases, is based in part upon this Court's decision in Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed.2d 287 (1969) and its progeny which established the concept of procedural due process whenever the government seeks to deprive a citizen of a statutorily granted property right. The Goldberg v. Kelly, *supra*, held that before a welfare recipient's benefits are terminated notice and a hearing are required. This due process requirement of notice and hearing has been held by this Court to apply to garnishing of wages; Sniadach v. Family Finance Corporation, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed.2d 349 (1969); revocation of a driver's license, Bell v. Burson, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed.2d 90 (1971);

repossession of consumer goods, Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed.2d 556 (1972); and tenure of a college professor discharged by a public educational institution, Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed.2d 548 (1972) and Perry v. Sindermann, 408 U.S. 495, 92 S. Ct. 2694, 33 L. Ed.2d 570 (1972).

Both Brown v. Lynn, supra, and Hoffman v. United States Department of Housing and Urban Development, supra, found reasons why the decision in Goldberg v. Kelly, supra, need not apply. In Brown, the Court held that there was no threatened injury or loss. 394 F. Supp. at 996. In Hoffman, the Court assumed that due process "would also require the Federal Government to give homeowners notice and opportunity to be heard before foreclosing their home", but found that defendants waived their right to be heard. 519 F.2d

at 1165. The instant case involves neither waiver nor absence of loss.

Petitioner believes that she is entitled not only to the same safeguards granted those persons deprived of statutorily created property rights, but also to the property rights envisioned by the Founding Fathers in drafting and adopting the Bill Of Rights. The taking of an individual's real property without due process of law, without a full hearing, is the type of action which the Founding Fathers sought to prevent. This concept is clearly understood by the Court in Ricker v. United States, supra, wherein it held,

It cannot be doubted that the Rickers were "deprived of . . . property without due process of law" in violation of the Fifth Amendment. First, the foreclosure and sale were initiated and carried out by federal employees acting on behalf of federal government. 417 F. Supp. at 138.

Furthermore, the Supreme Court of the State of California also recognized the difference between foreclosure by a private individual and foreclosure by a government entity. Garfinkle v. Superior Court, 21 C.3d 268 (1978). The Court in the Garfinkle case found that there was insufficient state action to trigger due process requirements when a private individual invoked the California nonjudicial foreclosure procedure against another private individual. However, the Court specifically stated ". . . the due process clause of the Fifth Amendment to the Federal Constitution, applie(s) to the state, not private action. . .", at p. 282. Clearly, the Garfinkle Court would not have allowed the State of California to utilize the nonjudicial foreclosure procedure against a private individual. In the instant case, the United States of America, for its own purposes, using its

own agents, seized property under the California nonjudicial foreclosure procedure. Clearly, the United States of America is not a lesser governmental body than the State of California.

The importance of a hearing is emphasized in this particular case. Petitioner and her attorneys repeatedly tried to obtain a hearing with the federal officials and with the Court, but they were unable to do so. Had the government been required to institute foreclosure proceedings in court, rather than taking the nonjudicial route, any number of things may have happened. In light of the facts set forth above, the government would have a tough time demonstrating that it had "clean hands." A judge doing equity may have done any number of things, including requiring the government to complete the construction, requiring the government to force the contractor to complete the

construction, allowing petitioner more time to pay off the debt, requiring the government to allow petitioner to lease the property, altering the payment schedule and amount, granting foreclosure, or any other thing which the court sitting in equity could do.

Federally insured loans are designed to facilitate the accomplishment of specific governmental purposes. Nowhere can it be shown that Congress intended said programs to be used as a vehicle to facilitate government acquisition of private property. Nor can it be shown that Congress ever intended that federally insured loans be used as an excuse for avoiding the mandates of the Fifth Amendment.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment

and opinion of the Ninth Circuit.

Dated: January 17, 1983

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